He said that the prosecution had to prove five things before there could be a conviction. They had to prove that Foo was dead; they had to prove that he died as a result of being shot; they had to prove that he was shot by a member of the gang who entered his house and that that man when he fired the gun had the intention to kill or so forth; they had to prove that each of the accused was a member of the gang and then he went on:—

"Fifthly, they have to prove, since neither of the accused fired the shot....each of them had the common intention with the man who did fire the shot either to kill or the common intention with that man to commit another offence at all cost and with the knowledge that the other members were armed with firearms which they intended to use, if necessary. And then they have got to prove to your satisfaction as part of that common intention that each of these accused and the man who fired the shot did some act in furtherance of that common intention, and not distinct from or separate from."

At the very end he returned to the point when he was telling the jury what verdicts were open to them. In the first place he said:—

"If the prosecution evidence has not satisfied you that the first accused was there and that he had with others including the man who fired the shot the common intention to murder or the common intention to commit an offence and to go to the extent of killing, if necessary, then your verdict against him would be not guilty."

A little later he said this:—

"If you are satisfied that the prosecution have to your satisfaction proved all of the ingredients which I have set out to you, namely, that the 1st accused was there as a member of the gang, took part in the affairs of the gang, that the man who fired the shot intended to murder or to kill Foo and that Foo was killed in furtherance of that common intention, then it is your clear duty to say he is guilty as charged."

In our view these passages were suitable and adequate to ensure that the jury applied their minds to the particular circumstances of the case in the light of the law as stated in the case of *Mahbub Shah* v. *King Emperor, supra.*

Finally the judge's summing-up was attacked on a number of grounds of detail. In our view these complaints were not justified and amounted to no more than that the summing-up was not as favourable to the appellant as it might have been.

In our view the summing-up was both adequate and accurate.

Appeal dismissed.

Solicitors: *Shook Lin & Bok.*

RE TAN TYE DECD.; TAN LIAN CHYE & ORS. v. ESTATE & TRUST AGENCIES (1927) LTD.

[O.C.J. (Chua J.) August 20, 1963]

[Singapore — Suit No. 1559 of 1960]

Trust and Trustees—Breaches of trust—Omission of trustees to properly invest trust funds—Loss to the trust which otherwise would not have occurred.

Trust and Trustees—Wilful neglect or default—Failure to take out money deposited in court and investing same in trustee securities—What constitutes wilful neglect or default—When onus on trustees to show no wilful neglect or default.

Trust and Trustees—Duty to invest—Prompt investing necessary—Beneficiaries may be consulted but trustee must exercise own discretion—Discretion not to be surrendered to beneficiaries—Money in hands of trustees—Whether money lying in court in hands of trustees—Whether money in hands of Accountant-General is investment in trustee securities.

Trust and Trustees—Relief for breach of trust—Trustees Ordinance (Cap.34), s.60.

The defendants were at all material times the trustees of the will of Tan Tye deceased. In 1953 the Government of Singapore acquired two pieces of land forming part of the trust property and paid compensation therefor the sums of $103,231.18 and $103,050.00 respectively into court. Notices of these payments were duly received by the defendants in May 1953. These sums were withdrawn by the defendants only in November 1957 and December 1959 respectively. The plaintiffs, some of the beneficiaries under the will of the testator, alleged that in failing to withdraw the two sums of money from the court promptly and invest them in trustee securities the defendants were guilty of breaches of trust and also of wilful neglect and default. The defendants maintained that (i) under the will of the testator the moneys could only be invested in land or houses in Singapore and that they had after consultation with the plaintiffs decided to wait as the price of immovable property was too high; (ii) litigation was pending with one or more suits in connection with the estate which may involve the possibility of capital expenditure by them out of trust funds; (iii) moneys with the Accountant-General were not moneys in their hands and as such they could not invest same and that they should only be chargeable for moneys actually received by them under section 32(1) of the Trustees Ordinance; (iv) the two sums of money have already been invested by the Accountant-General in trustee securities and that therefore there were no breaches of trust by the defendants; (v) that even if there were breaches of trust they were relieved by section 60 of the Trustees Ordinance. Further with respect to the second sum of $103,050 paid into court the defendants stated that the delay was due to the fact that (a) the property acquired was not vested in them by the order of court and (b) they could not satisfy the court that the testator's estate was entitled to the compensation money.

Held: (1) the defendants should have drawn out the money from the court as soon as it was convenient and should have invested it in trustee securities. Although the trustees may inquire as to the wishes and opinions of beneficiaries, they must always exercise their own judgment and not surrender it to any of the beneficiaries. The defendants therefore committed a breach of trust in failing to draw out and invest the money in court within a reasonable time;

(2) there was no evidence to show that the defendants have been guilty of "wilful neglect or default";

(3) money lying in court which trustees may and should have withdrawn by application is money in their hands;

(4) money paid into court and invested by the Accountant-General is not an investment in trustee securities;

(5) though the defendants acted honestly they had not acted reasonably and therefore they were not entitled to any relief under section 60 of the Trustees Ordinance.

Case referred to:—

(1) *Re City Equitable Fire Insurance Co.* [1925] Ch. 407.

The following cases were also cited in argument: *National Trustee Co. of Australasia Ltd.* v. *General Finance Co. of Australasia Ltd.* [1905] A.C. 373, P.C.; *Re Windsor Steam Coal Co.* [1929] 1 Ch. 151; *Re Partington* 57 L.T.R. 654; *De Vaynes* v. *Robinson* 53 E.R. 293; *Moyle* v. *Moyle* 39 E.R. 565; *Tan Soo Lock* v. *Tan Jiak Choo* [1930] S.S.L.R. 109; *In Re Warren* [1939] 1 Ch. 684; *Re Turner* [1897] 1 Ch. 536; *Hume* v. *Lopes* [1892] A.C. 112.

ACTION.

N. A. Mallal for the plaintiffs.

H. E. Cashin for the defendants.

Cur. Adv. Vult.

Chua J.: The plaintiffs in this case are some of the income beneficiaries under the will of Tan Tye deceased (who I will refer to as the testator.) They are the beneficiaries of over 70% of the income of the estate of the testator. The defendants were at the material times the trustees of the said will.

The claims of the plaintiffs are, *inter alia,* for a declaration that the defendants have committed breaches of trust during the course of their administration of the estate of the testator and have been guilty of maladministration and neglect of duty and for relief.

The first complaint of the plaintiffs is that the defendants wilfully neglected to take out of court the sum of $103,321.18 belonging to the testator's estate and invest the same and as a result the testator's estate has suffered loss which it would not have suffered but for the defendants' such neglect and default.

The facts are briefly these. The Government of Singapore acquired the testator's property known as Lot 402[3] Mukim XVII and on the 4th May, 1953, the Collector of Land Revenue paid into the court the testator's share of the compensation amounting to $103,231.18 by reason of the fact that "the said reputed owner has neglected to prove his competence to alienate the said land and has neglected to prove his title to receive the compensation." Notice of the said payment into court was duly given to and received by the defendants on the 11th May, 1953. This sum of $103,231.18 remained in Court for four and a half years and it was only on the 7th November, 1957, on an application by the defendants, that this sum was paid out to the defendants together with interest thereon amounting to $3534.41, at the rate of 1% per annum until the 28th February, 1957, and at the rate of 1½% per annum from the 1st March, 1957, until the 30th September, 1957. After taking out this money the defendants put it in a fixed deposit at a bank earning 4½%, after paying out various solicitors' costs.

The plaintiffs say that the defendants should have drawn out the money from the court within a reasonable time to invest the money in trustee securities or deposit it at a bank on fixed deposit, where the rate of interest is certainly more than the rate given by the Accountant-General. The plaintiffs seek a declaration that the defendants are liable to make good to the estate all loss of interest which has accrued to the estate by reason of the wilful neglect and default of the defendants in not taking out of Court and investing the said sum of $103,231.18.

As there is a *prima facie* case that it was the duty of the defendants to have drawn out the money and invest this sum of $103,231.18 with all convenient speed, the question is whether they have shown a case which is sufficient to excuse them for having neglected to do so.

The first excuse given by the defendants is that as a result of the directions given in the will the said money in court could only be invested by them in land or houses in Singapore or upon the security thereof and that the first plaintiff, who claimed to speak on behalf of the majority of the plaintiffs, had on many occasions in 1953 and 1954 been consulted by them as to the investment of the said money and on each occasion the first plaintiff informed them that they should wait before investing as the price of immoveable property was too high.

The second excuse given by the defendants is that from the 12th February, 1954, until the date when they filed their defence in this suit, litigation has been pending in one or more suits in connection with the estate, which said litigation involved the possibility of capital expenditure by them out of estate funds and had immoveable properties been purchased with the money in court it would have been necessary later to apply to court for authority to sell in order to meet such capital expenditure and not only further costs would have been incurred but there was a risk of selling at a loss.

I think it is clear from the will that the trustees are not expressly prohibited from investing in trustee securities. The defendants say that they were of the view that they could invest only in immoveable property and upon

the security thereof. It appears that they held this view in spite of the advice given by their own solicitors. On the 3rd June, 1954, the defendants wrote to their solicitors for advice in these terms:

"There is, however, one question which requires early consideration and that is the investment of capital moneys. We had mentioned this on several occasions to Mr. Tan Lian Chye but to the best of our recollection he asked us to wait. Will you please advise us as to what steps might now be taken on the investment question."

On the 4th June, 1954, the defendants' solicitors wrote as follows:

"We note that you had, on several occasions, mentioned to Mr. Tan Lian Chye the question of the investment of capital moneys but that he had 'asked you to wait'. We do not know what authority Mr. Tan Lian Chye had for making this request to you, but doubtless he had good reasons for doing so.

The law with regard to a trustee's duty of investment is as follows:—

'Unless a trustee is expressly otherwise authorised, he must duly and promptly invest all capital moneys coming to his hands and all income which is not required immediately for the purposes of the trust. Trustees in this Colony are guided by the Trustees Ordinance which sets out what are trustee securities etc.'

In view of Mr. Tan Lian Chye's present attitude, we think it would be safer for you to ignore his request and make such investments as you may consider fit and proper for the benefit of the Estate, so long as you invest capital moneys or any income not wanted for distribution, in trustee securities authorised by the Trustees Ordinance."

Mr. J. Wotherspoon the General Manager of the defendant company in his evidence said:

"When Mr. Eber advised me as to trustee securities I wondered if he had given the matter sufficient consideration as he was then not in the best of health. There had been previous order of Court and I asked him to look into the situation."

Mr. Wotherspoon said that he waited for Mr. Eber to reply but he did not think that he got the advice.

In my view the defendants should have drawn out the money from court as soon as it was convenient and invested it in trustee securities. Although trustees may inquire what are the wishes and opinions of beneficiaries they must always exercise their own judgment and not surrender it to any of the beneficiaries. The second excuse given by the defendants is no excuse at all. When they eventually drew out the money in November, 1957, they paid out of the sum received various solicitors' costs amounting only to $9,557.70 and they invested the balance. As I have said the money should have been drawn out much earlier.

Mr. Cashin for the defendants submits that the defendants as trustees may only invest money which is in their hands and that in this case the money was not in their hands until it was taken out of court and that by section 32(1) of the Trustees Ordinance the defendants are only chargeable for money actually received by them. The short answer to this argument is that the trustees in this case should and could have applied to the court for payment out soon after they received notice of the payment in. This was what they ultimately did but not until 1957.

Mr. Cashin further submits that the money in court was already in a public fund administered by the Accountant-General who invests in trustee securities and there was therefore no breach by the defendants. There is no substance in this submission. Money in the hands of the Accountant-General is not an investment in trustee securities.

The plaintiffs do not only allege breach of trust but also that the defendants have been guilty of wilful neglect and default in not taking out the money and investing it. The meaning of the phrase "wilful neglect or default" has been expounded by the English Court of Appeal in the case of *Re City Equitable Fire Insurance Co.*[1] The English Court of Appeal held that a person is not guilty of wilful neglect or default unless he is conscious that in doing the act which is complained of or in omitting to do the act which he ought to have done, he is committing a breach of his duty or is recklessly careless whether it is a breach of his duty or not.

I do not think that there is in this case evidence to show that the defendants have been guilty of wilful neglect or default. The only conclusion that I can draw from the circumstances of this case and the evidence which was given is that the defendants had in fact forgotten all about this money in court until 1957.

I find that the defendants did commit a breach of trust in failing to draw out and invest the money in court within a reasonable time.

The defendants say that even if there was a breach of trust, they should be relieved therefrom by virtue of section 60 of the Trustees Ordinance. I do not find that the defendants acted dishonestly in this case but I cannot say that they acted reasonably and furthermore, looking at all the circumstances and bearing in mind that the defendants are a Trustee Company, I do not consider that the defendants ought fairly to be excused for the breach.

The defendants, therefore, must make good to the testator's estate the amount of interest which would have been earned if the money had been drawn out and invested in trustee securities. The defendants are to be charged with simple interest at the rate of 6% per annum on the

sum of $103,231.18 from 11th May, 1953, to 7th November, 1957, less the interest which was paid by the Accountant-General. An account is to be taken to ascertain what is due to the testator's estate and on the taking of the said account the defendants are to pay to the testator's estate the amount found to be due.

The second complaint of the plaintiffs is that the defendants wilfully neglected to take out of court the sum of $103,050 belonging to the estate of the testator and invest the same and as a result the testator's estate has suffered loss which it would not have suffered but for the defendants' such neglect and default.

The third complaint of the plaintiffs is that as a result of the defendants' neglect and default the testator's estate has lost the sum of $500.

The facts are briefly these. In 1953 the Government of Singapore acquired the testator's property known as Lot 305 Mukim XVII and on the 8th May, 1953, the Collector of Land Revenue paid into court the compensation therefor amounting to $103,050 by reason of the fact that the "said reputed owner has neglected to prove his competence to alienate the said land and has neglected to prove his title to receive the compensation." Notice of the said payment into court was duly given to and received by the defendants on the 8th May, 1953. The compensation money remained in court until the 17th December, 1959, when the defendants took the same out of court together with interests thereon at the following rates: from date of payment-in until 28.2.57, 1%; from 1.3.57 to 30.9.57, 1½%; from 1.10.57 to 30.6.58, 2%; from 1.7.58 to date of payment-out, 1½%. On the 11th February, 1954, one Ang Keong Ngo and Tan Keng Hong (who I will refer to as the "claimants") administrators of the estate of one Tan Boon Huat deceased, instituted proceedings against the defendants, being Suit No. 274 of 1954, claiming, *inter alia,* declarations that at the date of the acquisition of the said land Lot 305 Mukim XVII they were seised of or otherwise entitled to the said land and that upon the said land being acquired by the Government they became entitled to the said compensation of $103,050. The suit was tried in 1959 and on the 3rd November, 1959, the claimants' claim was dismissed with costs and the court ordered that the money paid into court by the Collector of Land Revenue, together with interest accrued thereon, be paid out to the defendants. The defendants' party and party bill of costs was taxed and allowed at $6,681 and their solicitor and client bill was taxed and allowed at $8,361. The claimants filed a notice of appeal against the said judgment and deposited in court as security for the costs of the appeal the sum of $500. On the 16th December, 1959, the claimants withdrew their notice of appeal with the defendants' consent and subsequently withdrew the said deposit of $500.

The plaintiffs say that as a result of the wilful neglect and default of the defendants to take the said sum of $103,050 out of court and invest the same the estate of the testator has suffered loss which it would not have suffered but for the defendants' such neglect and default. As regards Suit No. 274 of 1954, the plaintiffs say that the defendants have taken no steps to recover the party and party costs and "in utter disregard of the interests of the estate, they did not even take the trouble of procuring the payment of the said sum of $500 to themselves as they were entitled to in part-payment of the said party and party costs" and as a result of the defendants' neglect and default the estate of the testator has lost the said sum of $500.

The defendants in their defence say they were appointed sole trustee of the will of the testator by an order of court made on the 12th October, 1937, and the said order vested in them the lands and premises belonging to the estate settled by the will of the testator and particularly described in the schedule thereto and the said Lot 305 Mukim XVII was not one of the properties described in the said schedule and the title thereto was never vested in them.

Mr. Wotherspoon, in his evidence on this matter said:

> "Lot 305 — I knew nothing about this Lot 305 until the notice of acquisition. When I got the notice I sometime later found that Lot 305 was not in the schedule of property attached to the Order of Court. I caused people to be sent to this Lot, they went with Tan Lian Chye who could give no information about the property at all. After notice came Tan Lian Chye was informed. I looked through the cause papers and other papers to get some light into the matter but I don't know how long I took. I also consulted our solicitors Messrs Eber & Tan. As result of advice I caused the estate to be represented at the inquiry by the Collector of Land Revenue. On 16th December, 1953, I received a letter from Allen & Gledhill stating that someone is claiming the property. (*Cashin:* Bundle 4 p.65). At that stage I was not convinced of the estate's title. I was not in the position to give any reason for the court to pay money to the estate. All this was known to Tan Lian Chye. In due course there was a reference to court and between 1953 and 1959 when case was heard there was this dispute with the adverse claimant. At various stages there were negotiations with solicitors of the claimant — a compromise over the ownership and a division of the acquisition. When all this was taking place Tan Lian Chye was kept informed. Nothing resulted in the negotiations and the matter proceeded to Court and we were successful and money was handed over to us.
>
> I deny we wilfully neglected to take out the money; it was because there was a dispute with a claimant.

The claimant filed in a notice of appeal. Negotiations followed with Allen & Gledhill. As far as I remember Allen & Gledhill said they were prepared to withdraw the notice of appeal provided we forego all the costs of the lower Court including the $500 deposit. I consulted my solicitors over this matter and my solicitors advised if we went to appeal and we were successful the costs of defending the appeal would come as much again as the costs in the lower court and if we were to waive costs now I would run no risk of losing the money. A letter was written to Tan Lian Chye who replied he did not agree. Despite Tan Lian Chye's refusal I proceeded to settle the matter on those terms."

In cross-examination Mr. Wotherspoon said:

"Yes I said the order of court appointing us trustees did not specifically refer to this Lot. When I received the notice from the Collector of Land Revenue I was a little puzzled. Yes I took the matter to my solicitors. I don't know if my solicitors made a search. (Cashin: Mr. Eber was ill at that time.) Yes the Collector of Land Revenue served me a notice, yes I took it to my solicitors, yes I also took with me the copy of the award. I would not say that I gave specific instruction to find out if we were the owner but I did say that there was a doubt in Land Office if we were the owners. I myself did not make a search in the Registry. The Collector raised some doubt as to our ownership and I left it to my solicitors. Yes possibility was that we had no power to sell and consequently no power to receive the purchase price.

(*Mallal*: Bundle 3 — p.24 Collector's affidavit para. 5: p.13 para.5).

Yes in the end I did take out the compensation money, there was a decision by court that we were entitled to it.

Yes I said I could not take out the money in court. I don't think my solicitors told us so. The money was paid into court as we could not receive the money according to Collector of Land Revenue."

The main consideration is, why did not the defendants draw out the compensation money before the 12th December, 1953? The defendants give two reasons:

The first reason is that the property was not vested in them by the order of court. Although Lot 305 was not described in the schedule to the order of the 12th October, 1937, nevertheless all properties of the testator vested in the defendants when they were appointed trustees. The defendants were wrong in thinking that Lot 305 was not vested in them.

The second reason is that they could not satisfy the court that the testator's estate was entitled to the compensation money. The defendants first became aware of this property when they received the notice of acquisition dated the 1st October, 1952. Mr. Wotherspoon said that after receipt of this notice he caused inquiries to be made about this property and he looked "through the cause papers and other papers to get some light into the matter." But he did not know how long it took and that he consulted the firm's solicitors. The defendants were making inquiries for 14 months and were unsuccessful in their inquiries and on 12th December, 1953, they were informed that the estate of Tan Boon Huat deceased was claiming the compensation money. I fear that the defendants did not make a thorough investigation into the matter. In Suit No. 274 of 1954, which was heard by me in 1959 and the file of which is before this Court, it was adduced in evidence that in 1873 the testator bought a piece of land off Balestier Road which in recent years has been known as Lot 305 Mukim XVII and that the deed of transfer was registered in the Registry of Deeds and was the last deed registered in respect of the said land. There is no evidence before me that the defendants made a search or caused a search to be made in the Registry of Deeds in 1952 and 1953. Now, if a search had been made the defendants would have discovered this fact and they could have satisfied the court that the estate was entitled to the compensation money. In my view the defendants have not been diligent and are guilty of negligence. Here again I cannot find that the defendants have been guilty of wilful neglect or default.

Mr. Cashin also advanced the same arguments which he advanced in respect of Lot 402 namely that money in the hands of the Accountant-General is an investment, that the defendants were under no duty to invest the money until the money was actually in their hands. I have already dealt with these submissions.

The defendants say that even if there is a breach of trust they should be relieved therefrom by virtue of section 60 of the Trustees Ordinance. Although I find that the defendants acted honestly, I cannot say that they acted reasonably and I do not consider that they ought fairly to be excused for the breach.

I find that the defendants did commit a breach of trust and they must make good to the testator's estate the amount of interest which would have been earned if the compensation money had been drawn out and invested in trustee securities. The defendants are to be charged with simple interest at the rate of 6% per annum on the sum of $103,050 from the 8th May, 1953, to the 3rd November, 1959, less the interest which was paid by the Accountant-General. An account is to be taken to ascertain what is due to the testator's estate and on the taking of the said account the defendants are to pay to the estate of the testator the amount found to be due.

As regards the $500 I do not find that the defendants have committed a breach of trust. The defendants had a discretion to come to a settlement with the claimants and they had taken legal advice and I cannot say that they had exercised their discretion wrongly; they had settled this matter in good faith.

The third complaint of the plaintiffs is that the defendants wrongfully paid the sum of $668 costs out of the capital funds of the testator's estate when the court in Suit No. 1232 of 1954, ordered that this cost be paid by the defendants personally. The defendants admitted that this sum of $668 was charged to the testator's estate but said that it happened through a clerical error and they denied that any false entry had been made in the estate's account with the intention of deceiving or misleading any beneficiary of the estate and they said that the first time they knew of it was when they read the statement of claim. I have no doubt that a mistake has been made in this case and I find that there is no breach of trust. The defendants have consented to pay the $668. There will be an order that the defendants refund to the testator's estate the said sum of $668.

The fourth complaint of the plaintiffs is that as a result of the inaction and neglect of duty on the part of the defendants the testator's estate has suffered and is suffering heavy loss.

The facts are briefly these. The testator's estate is the owner of Lots 354 [4] and 356 [1] of Mukim XXV, in the district of Geylang. By an indenture of lease dated the 5th August, 1936, the then trustees of the testator's estate created, with the sanction of the court, a lease over the said two pieces of land in favour of George Lee for the term of 20 years 10 months, as from the 1st August, 1936, at a progressive rental commencing at $100 per month and culminating in a rental of $800 per month. The said term expired on the 31st May, 1957. By an indenture of assignment dated the 2nd October 1936, the said George Lee, with the licence and permission of the then trustees, assigned all his rights under the said lease to the Happy World Ltd. Under the terms of the said lease the lessee was permitted to erect buildings on the said land and it was provided that at the determination of the said term the lessee would peaceably and quietly leave, surrender and yield up unto the lessors the said land with all buildings and structures thereon. The lessee erected numerous buildings and structures such as restaurants, cinemas, stadium, a dance-hall and other structures such as are commonly found in amusement parks. At the date of the expiry of the said term on the 31st May, 1957, the lessee was in receipt of approximately $30,000 per month as rent derived from the said buildings apart from income from the use of the stadium. In 1955 the lessee instituted proceedings against the defendants as trustees, being Suit No. 989 of 1955, claiming:

(a) a declaration that the land comprised in the lease together with the buildings erected thereon constituted "premises" within the definition of the word in the Control of Rent Ordinance, 1953;

(b) a declaration that the defendants have never at any time been entitled to recover a higher rent in respect of the said land than the standard rent;

(c) an order that the defendants do refund to the lessee all sums which the lessee had paid to the defendants in excess of the said standard rent.

The defendants counterclaimed for possession of the said land on a number of grounds. By an order of court dated the 24th February, 1956, on the application on the part of the plaintiffs herein except the 8th plaintiff, the 1st plaintiff was added as a defendant in the said suit and the 1st plaintiff filed a defence and counterclaimed for possession. In his counterclaim the 1st plaintiff repeated and adopted the counterclaim of the defendants and further or in the alternative claimed for possession on two other grounds. At the hearing of the suit in May, 1956, the defendants intimated to the court that they would press their counterclaim only if the lessee was successful in their claim and accordingly it was agreed by and between the parties that the counterclaims of both the defendants and the 1st plaintiff would be heard after the decision on the lessee's claim. During the course of the trial of the said suit the learned trial judge suggested that the proceedings ought to be settled and adjourned the proceedings to enable a settlement to be arrived at. Efforts were made by the defendants to settle the matter with the lessee by selling the property to the lessee or by granting a fresh lease to the lessee at an enhanced rent but their efforts were in vain as the plaintiffs refused to agree to any settlement. On the 7th May, 1957, Rodyk & Davidson the defendants' solicitors, informed the plaintiffs that the defendants did not propose to proceed with the counterclaim as the lease was about to fall in. The defendants were of the view that it was safer to commence fresh proceedings for possession immediately the lease had fallen in and upon their having given a month's notice to quit in the normal way. The plaintiffs did not agree to the abandoning of the counterclaim; they said that they would hold the defendants liable for any loss that might be incurred. On the 1st July, 1957, the suit came before the court again for hearing. Counsel for the defendants informed the court that the parties had not been able to arrive at a settlement and that he was instructed not to proceed with the defendants' counterclaim. Counsel for the 1st plaintiff informed the court that he was instructed to proceed with the 1st plaintiff's counterclaim whereupon counsel for the lessee maintained that the 1st plaintiff was not entitled to proceed with the counterclaim as the 1st plaintiff was not the landlord of the lessee. Counsel for the 1st plaintiff said that "the ground has been cut from under my feet" and that he was not in a position to proceed with the counterclaim. The learned judge reserved his judgment on the lessee's claim on the same

day. On the 10th July, 1957, Rodyk & Davidson, the defendants' solicitors informed the plaintiffs that pursuant to the plaintiffs' express wishes the defendants had instructed them to commence proceedings against the lessee forthwith and this they were about to do. On the 23rd September, 1957, Drew & Napier then solicitors for the 1st, 4th, 5th, 6th and 7th plaintiffs wrote to Rodyk & Davidson inquiring whether the defendants had taken any action to recover possession of the property from the lessee. On the 1st November, 1957, Rodyk & Davidson replied that they had instructions to commence proceedings for recovery of possession of the Happy World premises. No action, however, was taken and on the 21st November, 1957, Drew & Napier wrote to the defendants' solicitors inquiring why proceedings had not been taken when the notice to quit had expired on the 30th August, 1957. On the 30th November, 1957, Rodyk & Davidson replied that proceedings had been delayed in the hope that the learned judge would deliver judgment in Suit No. 989 of 1955. By a written judgment delivered on the 5th March, 1958*, the learned judge made the declarations and orders prayed for by the lessee and dismissed the counterclaims. In the result the defendants had to refund to the lessee a sum of $10,800 and pay the costs of the lessee amounting to $14,207.40 and their own solicitors' costs amounting to $12,350, all out of the testator's estate. The lessee has since then been paying the sum of $500 per month as standard rent of the premises. After the said judgment in Suit No. 989 of 1955 the plaintiffs again expressed grave dissatisfaction with the discontinuance of the counterclaim and they continued to press the defendants to commence immediate proceedings against the lessee for possession. They maintained that after eviction of the lessee the said land could easily be let out for much more than $500 per month, even $10,000 per month. On the 12th November, 1958, the defendants wrote to the 1st plaintiff the following letter:—

"We refer to our conversation with you towards the end of September 1958.

In accordance with your wishes, we instructed our solicitors to issue a notice to quit to the Happy World Ltd. The notice to quit was issued last month and will expire at the end of this month.

It seems unlikely that the Happy World Ltd. will comply with the notice, and that legal proceedings will be necessary. As you are aware, we have no evidence that all beneficiaries share your views as to the proposed action. You are also aware that Mr. Tan Keok Beng favours an amicable settlement with the Happy World Ltd. Mr. Tan Keok Beng, as the sole next-of-kin of Tan Lian Boh, is, according to information given to us, the only person capable of inheriting the capital, and his wishes should not be disregarded.

As we have already informed you, our solicitors have advised us that having regard to possible consequences of the proposed proceedings against the Happy World Ltd., we should, before proceeding further, obtain written authority from a substantial number of beneficiaries. Our solicitors have drafted a letter for signature by them, which we shall be pleased to produce to you if you will call at this office. We would appreciate your early attention to this matter."

The beneficiaries never came to sign the said letter and the defendants did not take any action against the lessee. On the 22nd July, 1959, the plaintiffs informed the defendants that they had lost all confidence in the defendants as trustees and that they desired the defendants to retire. On the 1st November, 1960, the plaintiffs commenced the present proceedings. By an order of court dated the 24th February, 1961, the defendants were removed from acting as trustees and the British & Malayan Trustees Ltd. were appointed trustees in their stead. The British & Malayan Trustees Ltd. were given liberty to institute such proceedings as they might consider advisable against the Happy World Ltd. The British & Malayan Trustees Ltd. have sued the Happy World Ltd. for possession of that part of the Happy World Amusement Park of which the testator's estate is the owner in Suit No. 934 of 1961. This suit has not been disposed of*.

Now those are the facts.

There are three main complaints of the plaintiffs:—

(1) the defendants abandoned the counterclaim;

(2) the defendants failed to have a reasonable rent fixed by the Rent Conciliation Board and

(3) the defendants took no action to have the lessee evicted.

The plaintiffs allege that, as a result of the inaction and neglect of duty on the part of the defendants, the testator's estate has suffered and is suffering heavy loss. The plaintiffs claim:

(1) a declaration that the defendants are liable to make good to the estate of the testator all loss which has already accrued or may hereafter accrue by reason of the default of the defendants in not taking steps to evict the tenant of the Happy World or having proper rent of the said property fixed by the Rent Conciliation Board;

(2) an inquiry consequent on such declaration and

(3) payment of the amount found due on such inquiry.

The plaintiffs say that the defendants have committed a breach of trust by abandoning the counterclaim but they have not shown that the defendants had a reasonable chance of success and that it was wrong to abandon the counterclaim.

The plaintiffs say that the defendants have

* [1958] M.L.J. 155.

* This suit has since been disposed of: see report next page.

committed a breach of trust for not taking fresh action for possession against the lessee but they have not shown in what way the defendants were wrong. All that the plaintiffs have done is to labour on the fact that the defendants had in July, 1957, promised to take fresh proceedings against the lessee and had failed to do so in spite of pressure from the plaintiffs and on the fact that the new trustees have taken action against the lessee for possession. Now, is that sufficient for the court to find that there is a breach of trust? I do not think so. There is no evidence even that the grounds on which the present trustees relied on to claim possession could have been relied on by the defendants.

The plaintiffs finally say that the defendants have committed a breach of trust by failing to have a reasonable rent fixed by the Rent Conciliation Board. Now, there is no evidence what was the reasonable rent that could be fixed by the Rent Conciliation Board. The court in Suit No. 959 of 1955 had found that the standard rent was $500 per month. The plaintiffs have not even touched on the question whether an application to the Rent Board would result in a higher rent being fixed. On the evidence that I have before me I am unable to say that there is a breach of trust.

There is as yet no evidence that the estate of the testator has suffered and is suffering heavy loss as a result of the defendants' failure to take action for possession. We will not know whether the testator's estate has suffered loss until the result of the suit brought by the new trustees against the lessee for possession is known. If the suit is successful then only can the plaintiffs be able to say that as a result of the neglect of the defendants in not taking action against the lessee for possession the testator's estate has suffered heavy loss. In my view it is premature to bring this complaint before the Court.

There will be judgment for the plaintiffs accordingly.

Judgment for the plaintiffs.

Solicitors: *Mallal & Namazie; Rodyk & Davidson.*

BRITISH & MALAYAN TRUSTEES LTD. v. HAPPY WORLD LTD.

[O.C.J. (Chua J.) September 19, 1963]

[Singapore — Suit No. 934 of 1961]

Landlord and Tenant—Controlled premises—Buildings therein let out by tenant to occupants—Premises locked by tenant for 3½ hours—Whether occupants had exclusive possession—Licence or tenancy—Test of.

Landlord and Tenant—Tenant receiving rent exceeding 110%—Using premises as common gaming house—Unlawful purpose—Breach of tenancy obligation—Control of Rent Ordinance (Cap. 242), ss. 15(1)(d) & (g).

In 1936, the trustees of the estate of Tan Tye deceased leased a piece of land to G.L. for a term of 20 years and 10 months as from August 5, 1936 at a rent progressing from $100 per month to $800 per month. In the same year the said G.L. assigned the lease to the defendants who erected a number of buildings on the said land with the permission of the trustees. The said lease expired on May 31, 1957 but the defendants remained in possession, under the protection of the Control of Rent Ordinance.

The various buildings on the land now known collectively as the Happy World are occupied by various persons who pay a total sum of $17,000 to the defendants. In respect of the occupants the defendants issued printed receipts for rents received prior to August 1955 but after that date began issuing receipts for fees for temporary occupation as licensees.

The Happy World has four gates, three of which are locked up at midnight and the 4th at 12.30 a.m. If there are late performances, the 4th gate is locked up at 2.30 a.m. after which no one is allowed to remain in the park. One gate is opened at 6 a.m.

From June to August 1957, one R hired a hall (the 'B' Hall) from the defendants in which he operated a game called "Skill-Ball" otherwise known as Lotto. The said hall was raided by the police on August 13, 1957 when 67 persons were arrested. Subsequently all of them pleaded guilty and in the result one person was convicted of assisting in the management of a common gaming house and was fined $500 and the other 66 persons were convicted of playing in a common gaming house and fined $10 each.

The plaintiffs, the present trustees, sought possession on the grounds that (1) the defendants have sublet a part of the premises and they receive in respect of such subletting, rents which exceed in the aggregate 110 per cent of the recoverable rent paid by them. Accordingly, section 15(1)(g) of the Control of Rent Ordinance applies; (2) the defendants in contravention of section 15(1)(d) of the Control of Rent Ordinance have used or have permitted the use of the said premises for illegal purposes; (3) the defendants have been and are in breach of an obligation of the tenancy and, accordingly, section 15(1)(b) of the Control of Rent Ordinance applies.

Held: (1) the occupants of the stalls and buildings had exclusive possession;

(2) these occupants were tenants and not licensees;

(3) the defendants have received from the subtenants more than 110% of the rent paid by them;

(4) 'B' Hall was a common gaming house within the Common Gaming Houses Ordinance and therefore the persons who operated the game of Skill Ball or played it were guilty of offences under the Ordinance;

(5) accordingly, the user of the hall in furtherance of an unlawful purpose came within section 15(1)(d) of the Control of Rent Ordinance;

(6) the plaintiffs are entitled to an order for possession as claimed and costs.

Cases referred to:—

(1) *Waller & Son, Ltd.* v. *Thomas* [1921] 1 K.B. 541.

(2) *S. Schneiders & Sons Ltd.* v. *Abraham* [1925] 1 K.B. 301.